IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROGELIO SALAZAR GASTELUM, Petitioner.	)	2 CA-CR 2006-0126-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200201168

Honorable Kevin D. White, Judge
Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

Rogelio Gastelum
In Propria Persona
Florence

H O W A R D, Presiding Judge.

¶1 After signing a plea agreement, petitioner Rogelio Gastelum pleaded no contest to aggravated assault, a class two felony, and was sentenced to a partially aggravated term of 7.5 years' imprisonment in October 2004. Gastelum filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., maintaining that his

waiver of a jury trial was not knowing and voluntary because neither counsel nor the trial court adequately advised him that he was waiving his right, pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to have a jury determine aggravating factors beyond a reasonable doubt; that his sentence was illegal because the court relied on aggravating factors that were not identified on the record, not admitted by Gastelum, and not proved at sentencing; that counsel was ineffective in failing to explain the consequences of the plea agreement to Gastelum and to object to the imposition of an aggravated sentence; and that the trial court failed to properly balance aggravating and mitigating circumstances before imposing sentence.

¶2 After hearing argument, the court denied relief. Based on the express language of the plea agreement, the court found Gastelum had been properly advised by counsel that, by entering into the plea agreement, he had waived his *Blakely* rights. This petition for review follows the trial court's denial of relief.[1]

¶3 We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse in the trial court's determination that Gastelum knowingly, intelligently, and voluntarily waived his *Blakely* rights. Similarly, the trial court did not abuse its

[1]In his petition for review, Gastelum also contends that counsel was ineffective in "fail[ing] to place [him] in [an] available restoration program" and that he was denied his right to a speedy trial. We will not address these claims because they were never presented to the trial court for its consideration. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see generally* Ariz. R. Crim. P. 32.9(c).

discretion in denying Gastelum's claim of ineffective assistance of counsel. However, because the court failed to set forth aggravating factors on the record as required by A.R.S. § 13-702(B) and *State v. Harrison*, 195 Ariz. 1, ¶ 12, 985 P.2d 486, 489 (1999), we vacate the sentence imposed and remand the case for resentencing.

Voluntariness of Waiver of *Blakely* Rights

¶4 Prior to his change-of-plea hearing, Gastelum signed a plea agreement that contained the following provision:

> The defendant waives his/her right to a jury determination of aggravating circumstances beyond a reasonable doubt. The Court, using the standard of preponderance of the evidence, may find the existence of aggravating or mitigating circumstances which may impact the sentence or disposition. The Court may find the existence of aggravating or mitigating circumstances without regard to the Arizona Rules of Evidence, from any source presented, including, but not limited to a pre-sentence report, letters to the Court, victim or witness statements or any other reliable source.

Gastelum initialed this provision, "indicating that he underst[ood] and knowingly, voluntarily and intelligently waive[d]" this right. Gastelum's attorney also signed the plea agreement, representing to the court that he had discussed Gastelum's waiver of constitutional rights with him.

¶5 At the change-of-plea hearing, the court questioned Gastelum and confirmed that he had read the plea agreement, that his attorney had reviewed the agreement's terms and explained their consequences to him, and that Gastelum understood the agreement's terms. In the following exchange, the court specifically addressed Gastelum's waiver of his

right to a jury's determination, beyond a reasonable doubt, of aggravating factors to be used for sentencing:

> THE COURT: Sir, you have certain constitutional rights in these proceedings. The rights are set forth in paragraph 11. I'm holding paragraph 11 up.
>
> Are those your initials next to those rights?
>
> [Gastelum]: Yes.
>
> THE COURT: Sir, I want to review those rights with you. [The court explained rights to a jury trial, to cross-examination and confrontation, to subpoenae evidence, to representation by counsel, to remain silent, to presumption of innocence, to proof beyond a reasonable doubt, and to appeal.]
>
> Furthermore, at sentencing, you would have certain rights too that you're addressing here in this plea agreement, sir. At sentencing, you would have the right to have a jury . . . determine whether there are any aggravating circumstances that justify a prison sentence in this case above the presumptive prison term [of] five years. In that proceeding, the rules of evidence would apply. . . .
>
> Do you understand, sir, that you have all of these rights that I just reviewed with you?
>
> [Gastelum]: Yes.
>
> THE COURT: And do you want to give those rights up so you can go forward with your plea agreement here today?
>
> [Gastelum]: Yes, I do.
>
> THE COURT: You also understand that paragraph 11A, sir, you made some agreements about what sentencing procedures will be used in this case. As I indicated, you've waived your right to a jury determination of aggravating factors.

> Instead you agreed here in this agreement that the Court will determine whether there are aggravating circumstances that would justify a prison sentence above five years; that the Court will not apply [a] beyond a reasonable doubt standard in determining [those factors] and that the Court uses a preponderance of the evidence standard. And furthermore, the rules of evidence would not apply in that proceeding.
>
> Do you understand that is what you're agreeing to as far as the sentencing procedure in this case, sir?
>
> [Gastelum]: Yes.
>
> THE COURT: That's agreeable to you, correct?
>
> [Gastelum]: Yes.
>
> . . . .
>
> THE COURT: Do you have any questions about anything that we have gone over up to this point?
>
> [Gastelum]: No.

¶6 Nothing precludes a pleading defendant from waiving the right to a jury trial on aggravating factors. *See State v. Brown*, 212 Ariz. 225, ¶ 26, 129 P.3d 947, 953 (2006). On this record, Gastelum failed to present a colorable claim that he did not knowingly, voluntarily, and intelligently waive his *Blakely* rights.[2] *See State v. Henry*, 114 Ariz. 494,

[2]Gastelum also argues, as he did below, that his rights were violated because he "was given no advance notice of aggravating factors" the court would consider at sentencing. We need not address Gastelum's legal arguments because this claim is unsupported by the record. The plea agreement clearly provides that the court may find aggravating factors "from any source presented" including a presentence report. At the change-of-plea hearing, the court deferred acceptance of the plea agreement until sentencing. Gastelum was then provided with a copy of the presentence report, which listed specific aggravating factors, and

496, 562 P.2d 374, 376 (1977) (knowing and voluntary waiver found where defendant told court he had read and understood plea agreement and his counsel averred, by signing the agreement, that he had advised him of his rights). The court did not abuse its discretion in denying relief on this claim.

Ineffective Assistance of Counsel

¶7 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable under prevailing professional standards and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to establish one required prong, the court need not address the other. *State v. Rosas*, 183 Ariz. 421, 422, 904 P.2d 1245, 1246 (App. 1995). To be entitled to an evidentiary hearing on a post-conviction claim, a petitioner must present a "colorable claim," that is, one that has an appearance of validity such that, if the factual allegations are true, the petitioner would be entitled to relief. *State v. Lemieux*, 137 Ariz. 143, 147, 669 P.2d 121, 125 (App. 1983).

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filed a sentencing memorandum addressing aggravating and mitigating factors. Gastelum thus did have advance notice of aggravating factors prior to an adjudication of guilt and had the opportunity to revoke the plea agreement before it was accepted by the court. *See* Ariz. R. Crim. P. 17.4(b), 16A A.R.S.; *cf. State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985) (defendant entitled to notice of A.R.S. § 13-604.01 enhancement allegations prior to commencement of trial).

¶8 In his post-conviction petition, Gastelum did nothing more than assert in a conclusory fashion that "failures on trial counsel's part prejudiced the outcome of his case." He did not "plead and prove . . . that he would have gone to trial but for counsel's ineffective assistance," *State v. Bowers*, 192 Ariz. 419, ¶ 20, 966 P.2d 1023, 1028 (App. 1998), nor did he even suggest such prejudice occurred. Gastelum thus failed to state a colorable claim of ineffective assistance of counsel, and the court did not abuse its discretion in denying relief on the claim.

Aggravating and Mitigating Factors

¶9 Gastelum's partially aggravated sentence of 7.5 years is within the statutory range for a class two felony. *See* A.R.S. § 13-702(A). However, although a sentencing judge has "wide discretion in the sources and types of evidence used" to determine an appropriate sentence, *State v. Ross*, 144 Ariz. 154, 157, 696 P.2d 706, 709 (App. 1984), "§ 13-702 requires the judge to tell the victim, the defendant, the appellate court, and the public what he or she considered as aggravation and mitigation and why he or she imposed an aggravated or mitigated sentence." *State v. Harrison*, 195 Ariz. 1, ¶ 11, 985 P.2d 486, 489 (1999).

¶10 At sentencing in this case, the court found that Gastelum's mental health was a mitigating factor, but concluded "the aggravating factors outweigh to a small degree that mitigating factor." Because the court never identified what aggravating factors it considered in making this determination, we must remand the case for resentencing. *See id*. ¶ 12

(substantial compliance with § 13-702 requires "at a minimum . . . articulating at sentencing the factors the judge considered to be aggravating or mitigating and explaining how these factors led to the sentence[] imposed").[3]

¶11 Accordingly, we grant review and grant relief in part. We vacate Gastelum's sentence and remand the case to the trial court for resentencing.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge

[3]Without knowing the aggravating factors the court considered in imposing the sentence, we cannot assess Gastelum's claim that the court abused its discretion by improperly weighing aggravating and mitigating factors. In any event, this claim is now moot because Gastelum will be resentenced.